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703-272—65——1

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 63

PHILIP R. CONSOLO, PETITIONER

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, AND FLOTA MERCANTE GRANCOLOMBIANA, S. A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AND THE FEDERAL MARITIME COMMISSION

We address ourselves in this brief to three contentions urged by the respondent carrier (Flota) in its main brief. The first is jurisdictional. It is that even if, before the passage of the Hobbs Act, an order of the Maritime Commission granting reparations was judicially reviewable only in an enforcement action brought by the shipper, that Act gave the courts of appeals jurisdiction to set aside such orders at the suit of the carrier (brief of Flota, pp. 23–32). The second contention to which we reply is that,

whether or not the court of appeals was correct in setting aside the Commission's order here on the ground that it was inequitable to compel the carrier to pay reparations to the shipper, the court's decision rested on a "fair assessment" of the record, and, therefore, should not be disturbed by this Court (pp. 57–65). The third is that the Commission's order is invalid on additional grounds, not reached by the court of appeals—improper conduct by Commission personnel in connection with the administrative proceeding and application of an improper measure of damages (pp. 65–67).

1. We argue in our opening brief (pp. 14–36) that orders of the Maritime Commission granting reparations, like ICC reparations orders, have never been judicially reviewable by means of an action brought by the carrier to set aside the order (a direct review action) but only in an action by the shipper to enforce it (an enforcement action); that this reflects a fundamental distinction implicit in the agencies' organic Acts between reparations and other types of proceedings; and that the Hobbs Act, in transferring jurisdiction of actions to set aside Maritime Commission (but not ICC) orders from the district courts to the courts of appeals, did not make reparations orders subject to challenge in direct review actions. Conceding *arguendo* that the review situation was as we say prior to the Hobbs Act, Flota takes sharp exception to our argument that the Hobbs Act effected no change. Some amplification of our position on this point may be helpful.

Section 2 of the Hobbs Act conferred on the courts of appeals exclusive jurisdiction to set aside such final orders of the Maritime Commission "as are now subject to judicial review pursuant to the provisions of" Section 31 of the Shipping Act. Section 31 provides:

> The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties.

Relying on the language of these sections and on the legislative history of the Hobbs Act, and conceding *arguendo*, as we have noted, that prior to the Hobbs Act the validity of an order granting reparations was judicially reviewable only in a shipper's enforcement action, Flota argues that the Hobbs Act enlarged the class of orders subject to challenge in direct review actions to include, for the first time, reparations orders.

(*a*) The first part of Flota's argument is textual. Flota reasons as follows: Section 31 speaks of actions to enforce, as well as actions to set aside, Commission orders; hence, to the extent that the carrier may, as we argue, obtain in the shipper's enforcement action judicial review of the validity of a reparations order, such judicial review is pursuant to Section 31; all orders judicially reviewable pursuant to that section may now, by force of the Hobbs Act, be challenged in the courts of appeals by way of direct review actions;

therefore, a reparations order, too, may be so challenged. This argument rests upon a misreading of Section 31.

That section has two quite different purposes. The first is to vest the courts with jurisdiction over actions to enjoin certain Maritime Commission orders. Nowhere else is such jurisdiction conferred; Section 31 is its only source. But Section 31 has an additional purpose: to prescribe the venue and procedure of all court actions arising from Commission orders, including actions to enforce such orders. The *jurisdiction* of the courts in enforcement actions, however, is created not by Section 31 but by Sections 29 and 30, the latter dealing with reparations orders. And insofar as a reparations order is judicially reviewable in an enforcement action, it is so by virtue of the language of Section 30 making the order and its underlying findings only *prima facie* evidence in the enforcement action, and not by virtue of anything in Section 31. Hence, the judicial review of a reparations order in an action to enforce the order is not pursuant to Section 31, but pursuant to Section 30.

(*b*) Flota's own analysis of the legislative history of the Hobbs Act reveals that the question whether reparations orders issued by the Maritime Commission would be reviewable under the Act in direct review proceedings was never adverted to in the course of the legislative deliberations; the focus was elsewhere. We have argued that prior to the Hobbs Act a reparations order could not be set aside at the suit of the party charged under Section 31 of the Shipping Act; for the purposes of its Hobbs Act

argument, Flota agrees. Accepting, then, that such orders could not be challenged in Section 31 direct review proceedings, we do not see how, in the absence of any legislative history on this point, Congress—merely by transferring jurisdiction of such proceedings to the courts of appeals—can be thought to have broadened Section 31. As we have seen, the language of the Hobbs Act certainly does not indicate that Congress meant to enlarge the class of orders which the courts were empowered to set aside under Section 31.[1] Congress, to repeat, conferred on the courts of appeals jurisdiction to set aside only those orders "now subject" to Section 31, and the court of appeals' jurisdiction, accordingly, is no greater than that which the district courts enjoyed under that section.

2. The Commission's determination that it was not inequitable to award Consolo reparations for the injury attributable to Flota's violation of the Shipping Act must, of course, be upheld if supported by substantial evidence on the record as a whole. The court of appeals held that it was not supported by substantial evidence, and Flota correctly points out that the court of appeals' decision on the substan-

[1] In describing the testimony of the Commission's Chairman, Flota in its brief (p. 29) does not mention that he said: "This suggestion [for modification of the language of the bill] in no way advocates that the bill be so drafted as to confer rights to review in addition to those now authorized by law" (Hearings before Subcommittees of the House Judiciary Committee on H.R. 1468, 1470, and 2271, 80th Cong., 1st Sess., and 2915, 2916, 81st Cong., 1st Sess., p. 145). As we have pointed out, existing law (Section 31) did not permit review of reparations orders by means of actions to set them aside brought by the party charged.

tiality of the evidence should not be disturbed by this Court so long as the court of appeals made a "fair assessment" of the record (*Labor Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502). In arguing that there was such an assessment by the court of appeals in this case, Flota relies heavily, and we think without justification, on the government's memorandum in response to Consolo's petition for certiorari.

In that memorandum we urged that the Court limit its grant of certiorari to the jurisdictional question. We said that while we believed that there was merit to Consolo's contention that the court of appeals had improperly substituted its judgment for the Commission's on the issue of equitableness (p. 11), "the reviewing court's redetermination of the equities did not involve [such] a flagrant disregard of the limitations of review" (p. 12) as to warrant further review. We also suggested that a central issue was whether the law was unsettled at the time of Flota's violation and that on this issue "the Commission's determination was entitled to less deference than on other matters." *Ibid.* The thrust of our argument, however, was not that the court of appeals had not committed reversible error but only that its error was not so grave as to justify this Court's exercising its discretionary jurisdiction to review the court of appeals' determination.

This Court disagreed, granting certiorari without limiting review to the jurisdictional question. The merits of the court of appeals' ruling on the equities issue are now before the Court; and we argue in our opening brief (pp. 44–52) that this ruling constituted reversible error. We there point out that the question

whether the law was in an unsettled state when Flota refused to grant Consolo refrigerated shipping space was not in fact crucial on the equities issue. For even if Flota was not certain that its refusal to serve Consolo was unlawful, it took, at the least, a calculated risk that it was; and, as between Flota and the innocent shipper harmed by its conduct, Consolo, the economic burden of the unlawful conduct should in fairness fall on the former—or so, at any rate, the Commission was entitled to conclude. In holding otherwise, the court below overstepped the proper bounds of judicial review of administrative orders. Accordingly, the court of appeals' decision should be reversed. Cf. *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592.

3. Flota argues that the Commission's order is invalid on two grounds in addition to that on which the court of appeals based its decision. These additional grounds were tendered to the court below; but the court, having decided that the Commission's order could not stand in any event because it was inequitable, found it unnecessary to, and did not, discuss or decide them. We submit that they are without merit.

(*a*) The first ground is that the administrative proceeding violated Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 1004(c), which requires the separation of the prosecutorial and adjudicative functions of the agency.[2] Flota complains of the partici-

[2] Section 5(c) provides in pertinent part that "[n]o officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the [agency's] decision."

pation of members of the Commission's staff in the drafting of the Commission's opinion because (1) they had participated as Public Counsel in the trial before the hearing examiner on the issue of whether Flota had violated the Shipping Act (though not in the trial on the reparations issue, held subsequently); and (2) had defended the Commission's first order, which the court of appeals set aside, in that court. The complete answer to both of these complaints is that Section 5(c) is by Section 5 of the Administrative Procedure Act expressly made inapplicable to "any matter subject to a subsequent trial of the law and the facts de novo in any court"; the legislative history makes clear that this language was specifically intended to exclude reparations proceedings from the requirement of separation of functions.[3]

[3] The legislative history is summarized in the *Attorney General's Manual on the Administrative Procedure Act* (1947), pp. 43–44:

* * * * *

* * * This exemption was explained in the reports of the Senate and House Committees on the Judiciary, as follows: "Where the adjudication is subject to a judicial trial de novo [it] is included because whatever judgment the agency makes is effective only in a prima facie sense at most and the party aggrieved is entitled to complete judicial retrial and decision." Sen. Rep. p. 16; H.R. Rep. p. 26 (Sen. Doc. pp. 202, 260). Exempt under this heading are certain proceedings which lead to reparation orders awarding damages, such as are issued by the Interstate Commerce Commission (49 U.S.C. 16) and the Secretary of Agriculture (7 U.S.C. 210). Senate Hearings (1941) pp. 75, 1389, 1508. In the Senate Comparative Print of June 1945 (p. 8) (Sen. Doc. p. 22) the scope of the exemption was described as follows:

"This exception also exempts administrative reparation orders assessing damages, such as are issued by the Inter-

We also note that the fact that the General Counsel's staff both defended the Commission's first order in the court of appeals and consulted in the preparation of the second order would not give rise to a violation of Section 5(c) even if reparations proceedings were not exempted; in merely defending the Commission's order in court, the staff was not engaged in the performance of an investigative or prosecuting function. See *Attorney General's Manual on the Administrative Procedure Act* (1947) p. 58, n. 8.

(*b*) Flota also argues that the gist of its violation of the Shipping Act was discrimination between shippers, and that in such a case loss of profits is not a proper measure of damages. To our knowledge, this position has been uniformly rejected (see pp. 51–52, n. 38, of our opening brief); its practical effect, if accepted, would be to make a violation of the Shipping Act based on the complete exclusion of a shipper from common carrier service irremediable.

The record shows that there was no other carrier to which Consolo could practicably have turned to obtain the shipping space refused it by Flota (R. 22, 86–89, 258, 278, 312, 313, 563). Had Flota not refused to serve Consolo, but, rather, had charged Consolo a discriminatorily high rate, and had Consolo as a result been unable to sell bananas shipped via Flota, all would agree, surely, that Consolo could recover damages for his losses. But Consolo was un-

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state Commerce Commission and the Secretary of Agriculture, since such orders are subject to trial *de novo* in court upon attempted enforcement."

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able to obtain from anyone the shipping space that he sought from Flota. Had he been able to obtain such shipping space, the record shows (R. 257, 270, 271, 277, 290–293, 445–449, 563, 564, 569–570), he could and would have bought additional bananas and sold them profitably in the domestic market. In these circumstances, the only possible measure of damages was his loss of profits. We emphasize that the record shows that had Flota granted Consolo the space which he sought and which, under the Shipping Act, he was entitled to, he would have been able to buy, ship and sell goods at a profit; and it also shows that the reparations awarded by the Commission in its second order represent a conservative estimate of these lost profits (see R. 513).

Interstate Commerce Commission v. *United States,* 289 U.S. 385, on which Flota relies, is not in point. That was a rate discrimination case. Both the higher and the lower rates were legal, and the carrier acted illegally only in that it charged different rates. The Court held that the disfavored shipper was not automatically entitled to recover, by way of damages, the difference between the two rates, but must prove damages. The Court pointed out (289 U.S. at 392) that the disfavored shipper had no right to be charged the lower rate—the higher rate was also legal. His only right was to be charged the same rate. Since the unlawful discrimination thus could be removed as effectively by raising the lower rate to the level of the higher rate as *vice versa,* the disfavored shipper was required to prove that the lower rate enabled the favored shipper to injure him competitively.

The present case is wholly different. Consolo was entitled to a *pro rata* share of Flota's refrigerated shipping space. Flota breached its duty as a common carrier in refusing him this space. Its refusal was unlawful in itself, just as if it had charged Consolo an illegal rate—in which event, the Court made clear in *Interstate Commerce Commission* v. *United States, supra,* the shipper could recover the full overcharge without proving competitive injury (289 U.S. at 390).

For the foregoing reasons, we urge that if this Court agrees with Flota that all issues pertaining to the validity of the Commission's order should be decided now, without a remand to the court of appeals for a decision on the issues it did not reach, the decision below should be reversed and the court of appeals directed to enter judgment affirming the order.

Respectfully submitted.

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